MIAMI REVIEW — MIAMI, FLORIDA

in the Supreme Court of the United States

October Term, 1976

NO. 76-902

RICHARD H. OLSEN,

Petitioner,

vs.

SAUL GOODMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Respondent prays that the Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Florida entered on the 30th day of November, 1976, and an order Denying Petition for Rehearing on October 15, 1976, be denied, and that said Petition for Writ of Certiorari be dismissed, forthwith.

INTRODUCTION

Respondent, being dissatisfied with the presentation by the Petitioner due to inaccuracies or omissions, has deemed it necessary to restate, pursuant to the provisions of Rule 40, portions of Petitioner's Petition for Writ of Certiorari, identified as:

OPINIONS BELOW;
JURISDICTION;
THE QUESTIONS PRESENTED; and
THE STATEMENT OF THE CASE.

Additionally, the Petition contains certain irrelevant, immaterial and scandalous matter, *de hors* the record, impugning the integrity of the Supreme Court of Florida.

For the foregoing reason, as well as others herein demonstrated, the Petition should be disregarded and stricken by the Court.

OPINIONS BELOW

The Opinion of the Supreme Court of Florida dated November 7, 1974, is printed as Appendix "A" hereto, although it is included in Petitioner's Appendix, but inasmuch as the contents thereof are frequently referred to in this Brief, it is printed for the Court's easy literary reference.

JURISDICTION

Petitioner invokes jurisdiction of this Court under Title 28, USC, §2101(c). Said Section contains no matters which pertain to the jurisdiction of this Court or the grounds upon which it may be invoked; and consequently, no fair claim for the invoking of jurisdiction is presented to this Honorable Court. Respondent is not fairly advised under what provision of the United States Code jurisdiction is claimed for this Petition, and must contest jurisdiction on all grounds. Certainly, the provisions of Title 28, USC, §2101(c), confer no jurisdiction on this Court to review the Judgment in question by Writ of Certiorari, and in fact, the provisions of Title 28, USC, §1257, require that Writ of Certiorari be from Final Judgments of the highest Court of the involved State.

Jurisdiction of this Court herein is denied on a variety of grounds set forth in detail in the Argument portion of this Brief, entitled "REASONS FOR NOT GRANTING THE WRIT".

A capsulization thereof, at this juncture, would be useful to the Court.

A. The Judgment of the Supreme Court of Florida, entered on November 7, 1974, sought to be herein reviewed, was not a Final Judgment, and remanded the cause to the Circuit Court of Dade County, Florida, for trial.

B. No substantial Federal question is raised by the Petition because the decision of the Florida Supreme Court, complained of herein, was based on non federal grounds.

QUESTIONS PRESENTED

The questions presented by Olsen herein, raised no substantial federal question. The questions as presented by the Petitioner are discussed at length, infra, in detail, but the response thereto can be capsulized for the easy reference of the Court, as follows:

1. In both Questions 1 and 2 presented by Olsen, the questions assume and state as fact matters which are not even presented by the Record but which are, in fact, de hors the Record. Both questions assume that former Florida Supreme Court Justice David L. McCain, made deliberate misstatements of fact and law to the members of the Florida Supreme Court while a Justice in Cases No. 43,168 and 45,356, which involved both the Petitioner and the Respondent.

The contention is that the Petitioner was thus denied due process of law.

Further, the question presented assumed that Olsen had demonstrated properly twelve substantive errors of fact and law contained in misleading, confidential written memoranda, circulated by McCain to the other Justices of the Court, and that therefore, the Order of the Supreme Court of Florida denying Olsen's second Petition for Constitutional Writ in Aid of Jurisdiction denied due process to Olsen.

The questions as fairly presented are simply, whether or not, on the Record before it, the Supreme Court of Florida denied Olsen due process in its Order denying his Petition for Constitutional Writ in Aid of Jurisdiction.

Respondent's position, stated in detail, infra, in the Argument section of this Brief, is simply that Olsen, in his Petition for Constitutional Writ in Aid of Jurisdiction, attempted to invoke the jurisdiction of the Florida Supreme Court, under Article V, Section 3(b)(4), of the Constitution of the State of Florida, the "All Writs" provision of the Florida Constitution.

The Supreme Court construed its own Constitution and denied the Petition. The construction of the Florida Constitution by its Supreme Court, Respondent contends, is uniquely within the province of the Florida Supreme Court and raises no substantial federal ground for invoking Certiorari.

STATEMENT

I. Nature of the Case

This Petition arises from a Petition for Constitutional Writ in Aid of Jurisdiction to the Supreme Court of Florida, which sought review, after Rehearing had been denied by the Supreme Court of Florida, of an Order of the Supreme Court of Florida, of November 7, 1974, granting the Petition to the Florida Supreme Court for Certiorari to Saul Goodman, reversing an affirmance by the District Court of Appeal of Florida, Third District, of a Judgment of that Court in favor of the Petitioner, Olsen, and remanding the cause for new trial.

This Petition seeks to review the Order of the Supreme Court denying Olsen's Petition for Constitutional

Writ in Aid of Jurisdiction. Said Order of denial being dated July 30, 1976, from which Rehearing was denied on October 15, 1976.

The aforesaid Order of the Supreme Court of Florida of July 30, 1976, does not constitute a "Final Judgment", which under Title 28, USC, may be reviewed by the Supreme Court of the United States by Writ of Certiorari.

II. Persons Involved

THE PETITIONER: Richard H. Olsen, is a member of the Florida Bar since 1957, a specialist in corporate acquisitions, both in New York and Florida, and an investor in numerous corporate stock acquisitions with special expertise therein. Since 1960, Olsen and the Respondent, Saul Goodman, a much older man, had a continuing quite close social friendship. Although Olsen never professionally represented Goodman, he did, over the course of years, give Goodman various legal opinions. Their relationship was quite close, and Goodman relied on him.

THE RESPONDENT: Saul Goodman, is sixty-seven (67) years old, a businessman long since retired (1958), unmarried and alone. Formerly, Goodman was an occasional investor who had several transactions with Olsen in the past.

III. The Case

This cause involved an action at law on a joint venture pursuant to a contract, hand-written by Olsen, an attorney, and dated September 17, 1968. Under the terms of the joint venture, Goodman (Plaintiff below and Respondent here), advanced the sum of $300,000.00 for the purchase of 50,000 shares of Omega Equities, Inc. common stock under an investment letter. Of the $300,000.00 advanced by Goodman under the joint venture, $150,000.00 was a loan to Olsen with which he was to purchase 25,000 shares of the 50,000 shares to be purchased. Goodman would purchase the other 25,000 shares with the remaining $150,000.00 of the funds being advanced.

The contract written by Olsen further provided that Olsen would repay the $150,000.00 on or before May 31, 1969, *with no interest.* Olsen further agreed that if Goodman wished to sell his 25,000 shares between October 1, 1969, and December 31, 1969, that Olsen would repurchase the same for $10.00 per share. Thereafter, Goodman delivered a check to Olsen for $300,000.00, which was subsequently delivered to Omega in exchange for the purchase of the stock in question.

After maturity of the note, Olsen repaid $60,000.00 of the $150,000.00 loan, but failed to make further payments. As a result, Goodman filed suit in the Circuit Court of Dade County, Florida, for repayment of the balance due, and for damages incurred by Goodman when Olsen failed to comply with the terms of the contract and declined to buy back the stock from Goodman. The principal defense interposed by Olsen was that the contract was usurious under the Laws of the State of New York, and unenforceable. Olsen made this contention, although he, himself an attorney, had drawn the agreement and had obtained as a result thereof, $15,000.00 from Goodman, his old friend, a non-attorney who had relied upon him. It was conceded by the parties that the transaction occurred in New York, and that New York Law should apply.

After a two day trial, a verdict in favor of Olsen resulted, which was followed by a Judgment thereon.

Goodman appealed to the District Court of Appeal of Florida, Third District, but the Appeal was dismissed for failure to timely file a Brief by his then counsel.

Goodman's appeal was reinstated when the Supreme Court of Florida granted a Writ of Certiorari, and remanded the cause to the District Court of Appeal of Florida, Third District, to be heard on its merits. Said District Court of Appeal of Florida, Third District, subsequently affirmed the Trial Court Judgment in favor of Olsen.

Goodman again sought certiorari from the Supreme Court of Florida pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida on a claim of jurisdictional conflict between Decisions of the Supreme Court and other District Courts of Appeal of Florida, and the Per Curiam Decision of the District Court of Appeal of Florida, Third District in the case at bar.

On June 24, 1974, the Supreme Court accepted jurisdiction on the cause and directed the parties to file Briefs on the merits of the cause.

No portion of the conditional Writ of Certiorari discussed or set forth the Court's reasoning in connection with the conflict in question, and allegations of the Petition and his Petition as to the Court's reasoning in this regard are but the purest speculation by Petitioner.

Because of efforts made throughout this Petition to cast aspersions on the integrity of the Supreme Court of

Florida, totally unsupported by the Record, it is necessary to set forth as to the Decisions of the Supreme Court of Florida herein involved, the names of the Justices, concurring and dissenting.

The Supreme Court of Florida accepted conflict jurisdiction of this cause on June 24, 1974, without dissent. The concurring Justices were Adkins, Chief Justice; Roberts; McCain; Dekle; and Overton. It should be noted that of the five Justices unanimously voting to conditionally accept jurisdiction, only two participated, whose integrity is contested by Olsen.

Subsequently, the Supreme Court, having granted conditional jurisdiction, entertained the merits of the cause and reversed the District Court of Appeal of Florida, Third District.

The cause was remanded to the Circuit Court of Dade County, Florida, for retrial and thus does not constitute a Final Judgment of the Supreme Court of Florida from which, under the Federal Judiciary Code, Petitioner herein may invoke certiorari.

The makeup of the Panel of the Florida Supreme Court which, having accepted certiorari, entertained the merits of the Petition and reversed the cause, and remanded it for new trial, is as follows: Adkins, Chief Justice; Roberts; McCain; Ervin; and Boyd. There was a single dissent by Justice Overton.

Thus, only one of the five Justices who remanded Petitioner's cause for a new trial to the Circuit Court of Dade County, Florida, has resigned, to-wit: Justice McCain. There was only one dissent. The foregoing actual head count of the panels of the Supreme Court granting certiorari in this cause and reversing the matter on its merits reveals the immateriality of the portions of this Petition which infer that the reversal of Olsen's case in the Supreme Court of Florida is due to improper motives or lack of integrity of the Florida Supreme Court.

There is absolutely nothing, even in the materials outside the record, presented in Petitioner's Appendix to his Brief which would indicate any irregularity, even in the assignment of the Goodman-Olsen case to Justice McCain, when Goodman's Second Petition for Writ of Certiorari reached the Supreme Court of Florida, Case No. 45,356.

In lieu of any evidence to the contrary, it must be presumed that Case No. 45,356 was assigned to Justice McCain in normal rotation under the blind filing system. Certainly no evidence appears, even *de hors* the record, and presented by Affidavits contained in the Appendix of the Petitioner, that would indicate otherwise.

Thereafter, a Petition for rehearing was filed by Olsen, which was denied on January 29, 1975.

In the face of such a record, any contention of irregularity in the handling of the cause at bar by the Florida Supreme Court or any further impugning of the motives and integrity of that body are patently absurd.

Nevertheless, a fact which is deliberately omitted from the Petition for Certiorari herein, on January 15, 1975, the Petitioner herein filed with the Supreme Court of Florida its first Petition for Constitutional Writ in Aid of Jurisdiction, Case No. 45,356. The Florida Appellate Rules and the Rules of the Florida Supreme Court provide only one Petition for Rehearing and the aforesaid Petition for Constitutional Writ in Aid of Jurisdiction was actually a second attempt at a Petition for Rehearing.

With the Court fully concurring, the first Petition for Constitutional Writ in Aid of Jurisdiction was denied on March 1, 1976.

Thereafter, the Petitioner attempted before the Florida Supreme Court, what amounted to a third application to that Court, for a Rehearing of the decision of the Supreme Court of Florida, on November 7, 1974, reversing the Third District Court of Appeals of Florida, on Certiorari, and remanding the Goodman-Olsen cause for new trial.

On June 29, 1976, Olsen filed a second Petition for Constitutional Writ in Aid of Jurisdiction with the Supreme Court of the State of Florida, which Petition was, in fact, a disguised third application to the Supreme Court of Florida, for rehearing of its decision of November 7, 1974.

The Petition for Constitutional Writ in Aid of Jurisdiction filed with the Supreme Court of Florida, covered in more detail, much of the same ground contained in Olsen's first Petition to the Supreme Court of the United States in this cause, Case No. 74-1610, and attempted by

the same means of innuendos, speculation, suspicion and immaterial, scandalous allegations, to obtain an additional Rehearing in this cause.

Olsen had appended to his original Petition for Certiorari to the Supreme Court of the United States, all of the confidential memoranda, Court files and Court notes of the Supreme Court of Florida, which embraced the decision of that Court of November 7, 1974.

Said documents were appended as Appendices "G", "H" and "I", to the aforesaid Petition of Olsen filed in the Supreme Court of the United States, which Petition was denied by this Honorable Court on October 6, 1975.

On July 14, 1976, a most unusual document was filed with the Supreme Court of Florida while there was still pending before that Court Olsen's Petition for Constitutional Writ in Aid of Jurisdiction. That document was a pleading not provided for in any fashion by the Florida Appellate Rules or by the Rules of the Florida Supreme Court. It was entitled as a Petition in Favor of Review and was filed by one Donald L. Tucker, purportedly in his capacity as Speaker of the Florida House of Representatives, and by William J. Rish, purportedly as Chairman of the Florida House of Representatives Select Committee on Impeachment Inquiry. (App. "B").

The pleading alleged no facts or authorities, but was simply a mere letter of support, designed to influence the Supreme Court of Florida to grant the Petition filed by Olsen for Constitutional Writ in Aid of Jurisdiction.

The Petition was extraordinary in the sense that although it purported to be brought on behalf of the "Select Committee on Impeachment of Justice McCain," and by Donald Tucker, as Speaker of the Florida House of Representatives. No Resolution of the House of Representatives authorized either Tucker or Mr. Rish, as Chairman of the Select Committee, to attempt to intervene or file pleadings in the private lawsuit between two Florida citizens, and obviously, therefore, the House of Representatives and its Committee, and in particular, Messrs. Tucker and Rish, had no authorization to file the Petition in Favor of Review.

Interestingly enough, the authority of Mr. Rish's "Select Committee" expired when former Justice McCain resigned from the Florida Supreme Court on April 28, 1975.

That the Select Committee's authority ended with the McCain resignation, was conclusively admitted by Committee Staff Director Mark Glick. In his Affidavit supporting the original Olsen Petition for Certiorari filed with the Supreme Court of the United States. Glick stated:

> "16. The resignation of Justice McCain ended the authority of the Select Committee on impeachment and precluded further investigation into the Goodman-Olsen cases."

The bona fides of the "Petition in favor of Review," filed over the signature of Staff Director Mark Glick for the "Select Committee on Impeachment," is immediately suspect where the party filing the Petition has already

sworn, under oath, that his Committee's authority was ended in April 28, 1975, fourteen months prior to the filing of the "Petition in Favor of Review."

On July 30, 1976, the Supreme Court of Florida denied the Olsen Petition for Constitutional Writ in Aid of Jurisdiction and the "Petition in Favor of Review," filed by Messrs. Tucker and Rish, allegedly signed and authorized only by the expired Select Committee on Impeachment by its Staff Director, Mr. Mark Glick. Actually, neither Mr. Tucker nor Rish signed the Petition nor have they in any fashion signed through counsel representing them.

As the face of the document reveals, the Petition in Favor of Review was actually signed as authorized only by the defunct Select Committee on the impeachment of Justice McCain, by Mr. Glick.

A Petition for Rehearing was denied by the Florida Supreme Court on October 15, 1976.

REASONS FOR NOT GRANTING WRIT

Title 28, USC, §1257, provides as pertinent hereto, as follows:

> "Sec. 1257 — STATE COURT; APPEALS; CERTIORARI — Final Judgments or Decrees rendered by the highest court of a State in which a Decision could be had, may be reviewed by the Supreme Court as follows . . ."

The language of the above-quoted pertinent Statute is crystal clear that this Honorable Court will review by

certiorari, as pertinent to the instant cause, only a Final Judgment of the highest court of Florida. The language speaks for itself, but has been highlighted and underlined many times by the Decisions of this Honorable Court.

In the case at bar, the Supreme Court of Florida reversed the District Court of Appeal of Florida, Third District, and remanded the cause for a new trial by jury, on November 7, 1974. Respondent's first Petition for Certiorari which this Court denied on October 6, 1975, sought Certiorari from that November 7, 1974, Judgment of the Supreme Court of Florida.

This Petition for Certiorari is even farther removed from a "Final Judgment."

After the Supreme Court of Florida had denied on January 29, 1975, a rehearing of its Order of November 7, 1974, and Olsen's first Petition for Constitutional Writ in Aid of Jurisdiction on March 1, 1976, Olsen filed a second Petition for Constitutional Writ in Aid of Jurisdiction. The Supreme Court of Florida denied Olsen's second Petition for Constitutional Writ on July 30, 1976, and his Petition for Rehearing therefrom, on October 15, 1976.

By no stretch of legal sophistry, is the Florida Supreme Court Order of July 30, 1976, from which Olsen's Petition is taken, related to the "Final Judgment" required to invoke this Court's jurisdiction.

As a general rule, Judgment of the highest court of a State, reversing an inferior Court and remanding the case to the Lower Court for new trial, is not a Final Judgment, and hence, is not reviewable by the Supreme Court

of the United States. *Urie vs. Thompson*, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018, 11 A.L.R.2d 252; *Gulf Refining Co. vs. U.S.*, 269 U.S. 125, 70 L.Ed. 195, 46 S.Ct. 52; *Scott vs. Booth*, 253 U.S. 475, 64 L.Ed. 1020, 40 S.Ct. 484; *Coe vs. Armour Fertilizer Works*, 237 U.S. 413, 59 L.Ed. 1027, 35 S.Ct. 625.

Case law is clear that, in general, the finality of a State Appellate Court's reversal of a Lower Court depends upon whether under State Law, the effect of the reversal is to grant a new trial.

In *Gospel Army vs. Los Angeles*, 331 U.S. 543, 91 L.Ed.1662, 67 S.Ct. 1428, it was held that an unqualified reversal by a State Court is not a Final Judgment, for purposes of review by the Supreme Court of the United States, where the reversal operates to remand the case for a new trial.

The foregoing basic propositions of law which are applicable hereto, show that without question the language of the opinion of the Supreme Court of Florida in the cause at bar, remanding this cause for a new trial renders the reversal and the decision not a "Final Judgment" for purposes of Court review.

As this Court said in *North Dakota Pharmacy Board vs. Snyder Stores*, 414 U.S. 156, 38 L.Ed.2d 379, 94 S.Ct. 407:

> "(2) The finality requirement of 28 U.S.C., Sec. 1257 (28 U.S.C.S., Sec. 1257) which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

As Mr. Justice Frankfurter stated in *Radio Station WOW vs. Johnson*, 326 U.S. 120; 89 L.Ed. 2092, 65 S.Ct. 1475:

> " . . . And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation (414 U.S. 160) only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree'. Sec. 237 of the Judicial Code, 28 U.S.C., Sec. 344(a) (28 U.S.C.S., Sec. 344(a)). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

As pointed out in *Gospel Army, supra*, a Judgment of an Appellate Court, to be final and reviewable under this Title, must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the Trial Court, except the ministerial act of entering Judgment, which the Appellate Court directed. In that case, the Judgment reversed by the California Supreme Court had the effect, under State practice, of remanding the case for new trial. The rationale of the case conclusively applies to the cause at bar. A host of additional decisions are all to the same effect, and have been

cited, supra. A typical cause whose decision is precedent for the denial of certiorari herein is *Southern Pacific vs. Gileo*, 351 U.S. 493, 100 L.Ed. 1375, 76 S.Ct. 952. In that case where the California Supreme Court reversed decisions of Lower California Courts and remanded cases for trial on the issues of negligence and damages, the Supreme Court of the United States held that there was no "Final Judgment" of the highest court of a State, within the meaning of the Title in question; and, therefore, the United States Supreme Court lacked jurisdiction to review.

There can be little question that in view of these authorities and the specific language of 28 U.S.C., §1257, no jurisdiction for review is indicated herein.

As pointed out previously herein, multiple grounds exist for the denial of jurisdiction by this Court to entertain Olsen's Petition for Certiorari. Certainly foremost among them is the fact that neither of the two questions presented by Olsen herein raise a substantial federal question.

Olsen seeks review of an Order of the Supreme Court of Florida, denying his Petition in that Court for a Constitutional Writ in Aid of Jurisdiction.

His Petition in the Florida Supreme Court sought to invoke the jurisdiction of that Court under Article V, Section 3(b)(4), of the Constitution of the State of Florida. In denying Olsen's Petition for Constitutional Writ, the Florida Supreme Court necessarily interpreted its own Constitution.

Jurisdiction was sought by Olsen under the, "All Writs" Section of the Florida Constitution under which the Supreme Court of Florida is granted the power, "to issue all Writs necessary to the complete exercise of its jurisdiction."

This Honorable Court has stated many times, and established as a solid proposition of law, that it will not review a Judgment of a State Court where the contention is that the State Court exceeded its powers under the State Constitution. A review is precluded if the decision of the State Court is upon a point of local or general law sufficient to support the Judgment. This rule is not altered by the fact that the Supreme Court may consider the position of the State Court in the non-federal or local matter as an unsound one. *Schuylkill Trust Co. vs. Pennsylvania*, 302 U.S. 506, 82 L.Ed. 392, 58 S.Ct. 295; *DeSaussure vs. Gaillard*, 127 U.S. 216, 32 L.Ed. 125, 8 S.Ct. 1053.

Petitioner is asking this Honorable Court to review the Judgment of the Florida Supreme Court constructing its own State Constitution; and this, as the foregoing citations and many more indicate, this Court has pre-emptorily stated it will not do.

Parenthetically, it is well to note that the position of the Florida Supreme Court on the non-federal or local matter involved, i.e., the interpretation of the "All Writs" provision of the Florida Constitution, was, as a matter of fact and as a matter of law, a sound position.

Florida case law is clear, since *State ex rel Watson vs. Lee*, 8 So.2d 19, that the constitutional power granted to the Florida Supreme Court to issue, "all writs necessary

or proper to the complete exercise of its jurisdiction," refers only to ancillary writs to aid in complete exercise of original or appellate jurisdiction of the Supreme Court and does not confer added, original or appellate jurisdiction in any case.

As the Florida Supreme Court said in *Watson vs. Lee:*

> "The Constitution of the State and not a common law prerogative or other writ confers jurisdiction upon the Supreme Court of Florida. Judicial writs when duly authorized and issued, are the means by which the all ready conferred jurisdiction of the Court may be applied to particular cases. Unless the Constitution confers jurisdiction on the Supreme Court, the issue of a judicial writ by the Court does not confer jurisdiction upon the Court. Where the Court has jurisdiction the issuance by it of a judicial writ attaches the existing, conferred jurisdiction of the Court to a particular case."

In the instant cause, and in reference to the order from which the instant Petition is taken, no all-ready conferred jurisdiction existed in the Florida Supreme Court by which an ancillary so called Constitutional Writ could be issued.

Of the two matters complained of in this Petition, the latest of them in point of time, is the opinion and decision of this Court of November 7, 1974, granting Goodman's Petition for Certiorari. Petition for Rehearing was thereafter, denied, as set forth supra, as was a subsequently filed Petition by Olsen, to the Supreme Court of the United States, and as was thereafter filed, a former Petition for Constitutional Writ in Aid of Jurisdiction.

No matters were pending before the Florida Supreme Court which would confer jurisdiction between these parties in that Court to which an ancillary writ could issue. The Florida Supreme Court having denied Olsen's Petition for Rehearing of its Order of November 7, 1974, granting Certiorari to Olsen, that Court lost jurisdiction of the cause.

As the Florida Supreme Court stated further in *State ex rel Watson vs. Lee*, supra:

> "When, and not until, jurisdiction is acquired can ancillary writs be duly issued by the Court, and only when necessary or proper to the complete exercise of its jurisdiction."

Florida Appellate Rule 3.14(e), specifically provides as follows:

> "The Petitioner shall be entitled to file only one Petition for Rehearing with respect to the particular decision and no further Petition or Motion will be received or filed by the Clerk or considered by the Court."

Thus, as aforesaid, the Petition for Rehearing having been denied, and the cause having been remanded to the trial Court, the Supreme Court of Florida, had lost jurisdiction and no ancillary writ could be issued by that Court.

In addition to the clear lack of jurisdiction on the part of the Florida Supreme Court to issue a Constitutional Writ in Aid on Jurisdiction, as requested by Olsen, the Petition itself was based on facts which were obviously and patently non meritorious.

Olsen's Petition for Constitutional Writ in Aid of Jurisdiction as stated herein supra, was largely a rehash of previous Rehearing Petitions, filed before the Supreme Court of Florida, Olsen's prior application to the Florida Supreme Court on his first Petition for Constitutional Writ in Aid of Jurisdiction and a prior application for Certiorari to the Supreme Court of the United States, all of which had been previously denied.

In a major portion of his Petition, Olsen set forth what he termed was a complete picture of the misrepresentations, omissions and fraud practiced in this case. The same should be more realistically phrased as a compilation of irrelevant trivia, speculation, innuendoes and suspicion, founded on not an iota of fact, and without any support whatsoever from the Record. Olsen led off by attempting to make capital out of the fact that Goodman's original Petition for Certiorari to the Florida Supreme Court in this cause initially was assigned to Justice Ervin and then reassigned to Justice McCain as lead Justice. Mr. Sid J. White, Clerk, of the Third District Court of Appeal of Florida, testified before the House Select Committee on Impeachment that he had no recollection as to whether or no any request had been made by McCain for assignment in the instant cause.

Consequently, in lieu of any evidence to the contrary, it must be assumed that Justice McCain did not make such

a request. It certainly cannot be the result of speculation and innuendo and suspicion that in some manner he did, when there is absolutely no evidence to that effect.

Apparently, the Court changed its mind as Courts frequently do, as to whether or not the Court had jurisdiction in the cause to entertain Certiorari. There is no explanation for the change and in lieu of any evidence to the contrary, it must be presumed that it was a routine change of opinion, such as, from time to time, does occur in appellate decisions.

In a contention labled Item 3 on Page 8 of this Petition, Olsen attempted to resurrect as, "misleading" a statement in a Court memorandum on "Determination of Jurisdiction on Reassignment, February 5, 1973," written by former Justice McCain. Olsen, in this particular item in his Petition, took issue with a statement by former Justice McCain that, "Petitioner filed its Brief at the Court's suggestion on that date."

The Petition then went on to argue at large, that the Third District Court of Appeals of Fla. had never suggested that Goodman file his Brief and to take issue with the decision of law granting conflict which involved *Hector Supply vs. Carter*, 122 So.2d 22.

All of these contentions and claims as stated hereinabove, supra, were "old hat" and had been before the Florida Supreme Court on prior occasions and ruled inadequate. Nevertheless, by these extraordinary Petitions, which had no basis jurisdictionally or otherwise, Olsen attempted to require that Court to rehear over and over again, arguments which they had, long ago, rejected.

As pointed out, supra, the contentions about Goodman's Brief having been filed at the Court's suggestion, and the complaints about the erroneous law being applied, in re *Hector Supply Company vs. Carter*, supra, were all raised in a prior extensive Motion for Rehearing filed by Olsen on May 9, 1973, and denied on June 26, 1973, by the Florida Supreme Court.

In his Petition, Olsen then went on further to contend that former Justice McCain misled the Court by a note on the memorandum containing recommendations which stated:

> "Without attempting to go to the merits the record proper indicates a fairly strong case for Petitioner, i.e., (1) no showing of prejudice to Respondent to the Petitioner's tardiness in filing brief, (2) internal mixup between lawyers and (3) brief was finally filed by Petitioner."

Again, Olsen was simply attempting to reargue questions of law, long since decided by the Court. There was certainly no question that no showing of prejudice to Olsen was ever made due to the delay of Goodman in filing the Brief nor was there any question that Goodman did file a Brief at the time of oral argument.

One contention made by Olsen in his Petition for Constitutional Writ in Aid of Jurisdiction, was a total misrepresentation to the Florida Supreme Court. At Page 10 of his Petition, objecting to the above quoted McCain note, Olsen said:

> "There was only one attorney of record for Goodman so that there was no 'mixup' between lawyers; . . . ."

Of course, both the Record and the Appendix filed by Goodman with his Brief in Case No. 43,168, contained the motion of Goodman for Leave of Court to File Appellant's Brief and the supporting Affidavit of Ivonne N. Conner, a secretary to Goodman's counsel, as well as the Affidavit of Frank Ragano, himself, Goodman's counsel, as to the circumstances which occasioned the tardiness of Goodman's Brief.

The Affidavits explained that Frank Ragano was a law partner with Raymond LaPorte, and that LaPorte maintained the Tampa office of the firm, and that Ragano handled the Miami office.

Ragano's Affidavit revealed that Raymond LaPorte had, at all times, maintained the primary responsibilities for the handling of this case, and that all papers pertaining to the appeal were filed from the Tampa office and all Transcripts sent to the Tampa office. The Affidavit went on to aver that Ragano believed that Raymond LaPorte, his Tampa partner, was preparing and handling the appeal. When Ragano became aware that the Brief had not been filed by LaPorte, as he was supposed to do, he immediately attempted to correct the error.

Obviously, then, the major contention of Goodman in seeking permission to file his Brief as supported by

Affidavits and which were part of the Record, was the "mixup" between LaPorte and Ragano, one in Tampa and one in Miami, as to the filing of Goodman's Brief.

The statement in Olsen's Petition for Constitutional Writ in Aid of Jurisdiction, Page 10 thereof, relating to the Florida Supreme Court that there was only one attorney of record for Goodman, so that there was "no mixup between lawyers," was clearly an attempt to mislead this Court into believing former Justice McCain's footnote to be totally false. The opposite is clearly true and is a fair measure of the bona fides of Olsen's Petition. If ever there was a misrepresentation, certainly this one made to the Florida Supreme Court is obvious and gross.

In the next section of his Petition, Olsen complained about what he termed extraordinary circumstances and misrepresentations as to Case No. 45,356. Again, he complained about the case being assigned to former Justice McCain, even under the standard procedure of blind assignment on a rotation basis by the Clerk's office.

In lieu of any evidence to the contrary, the Record indicates that Case No. 45,356 was assigned to Justice McCain in normal rotation, innuendo of Olsen to the contrary.

The principal item criticized as to Case No. 45,356 by Olsen in his Petition, was the memorandum written by Justice McCain, on "Determination of Jurisdiction Certiorari." Most specifically, Olsen deplored what he contended was a misrepresentation by omission to apprise the Court that the case was to be governed and tried under the laws of the State of New York, as agreed to by the parties therein.

Any reading of the opinion filed November 7, 1974, in Case No. 45,356, reversing the Third District Court of Appeal of Florida, and remanding the matter for a new trial, would show how ridiculous Olsen's contention is. Obviously the panel was totally advised and completely aware that the case was governed by and tried under the laws of the State of New York as agreed upon by the parties.

The entire opinion deals with the discussion of New York law, of the New York Usury Statute and of the interpretation of New York cases involving the same.

The Court simply found that under New York law, the contract between the parties was a joint venture, and that, thus, the defense of usury was not applicable.

The Court said:

> "Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instruction to the jury thereon in this action tried in Florida, was error." (App. "A"-A-6).

Justices Adkins, Roberts, Ervin and Boyd concurred with McCain in the opinion, with only Justice Overton dissenting.

Olsen, in his Petition, even objected to the statement in the memorandum by former Justice McCain:

> "Goodman and Olsen entered into an investment contract related to a business venture."

The contract between the parties handwritten by Olsen himself, an attorney, commences with the sentence, "As per our joint venture, it is agreed that you shall put up the sum of $300,000.00, of which sum I am borrowing $150,000.00. . . ."

Again, going on in his Petition for Constitutional Writ in Aid of Jurisdiction, Olsen objected to the statement by McCain:

> "Olsen prepared and wrote in his own hand a contract under the terms of which Goodman agreed . . . ."

The truth of it is and the Record reveals that Olsen did prepare and write in his own hand, the contract involved. The statement at Page 13 of the Petition that the agreement was dictated to Olsen by Goodman is patently false, and a misrepresentation to the Florida Supreme Court. Even a cursory examination of the Transcript of Testimony references made in support of this statement in the Petition, revealed that Goodman did not dictate the agreement to Olsen. There is no question that Goodman requested and required some evidence to support the agreement between the parties and his loan of $150,000.00 to Olsen, *without interest*. The Record reveals that the parties sat together in New York and Olsen prepared the document, paragraph by paragraph, and at the conclusion of each paragraph asking Goodman if that represented a correct statement to which, as they proreeded, Goodman would assent.

The next item complained of in the Petition related to the $10,000.00 which Olsen paid to Goodman via a

Western Union Money Order, sometime after the agreement between the parties was signed. That this sum and that this contention of Olsen was not before the Florida Supreme Court at all times pertinent hereto, is ridiculous to assert. Actually, the item in question was raised in the basic pleadings in this cause in the trial Court, and was the basic subject matter of the First Petition for Constitutional Writ previously filed by Olsen in this cause, on December 15, 1975, which Petition was denied by the Florida Supreme Court on March 1, 1976, Justices Overton, Roberts, Adkins, Sundberg and Hatchett concurring.

Petition for Rehearing was denied by the Florida Supreme Court on April 2, 1976. The remainder of the contentions of Olsen as set forth in his Petition for Constitutional Writ in Aid of Jurisdiction are simply rearguments and rehashing of the laws of New York and of Olsen's allegedly violated constitutional rights under the Constitution of the United States.

All of these matters have been raised before in Olsen's First Petition for Certiorari filed in the Supreme Court of the United States and in various Petitions for Rehearing and applications for Constitutional Writs previously filed in this cause.

CONCLUSION

No grounds for invoking the jurisdiction of this Honorable Court to issue a Writ of Certiorari have been properly invoked herein.

In summarizing, the Petition herein incorrectly seeks Certiorari from an Order and decision of the Supreme Court of Florida of July 30, 1976, and an Order denying a Petition for Rehearing, entered on October 15, 1976, neither of which was a Final Judgment but which remanded the cause to the trial Court for jury trial.

The Order of the Supreme Court of Florida of July 30, 1976, from which review is sought herein, is thus, not a "Final Judgment" from which Certiorari will issue from this Court.

No substantial federal question is raised by the Petition, as is evidenced by the Petition itself.

The Order from which Olsen seeks review herein, is an Order of the Supreme Court of Florida, denying Olsen's Petition for Constitutional Writ in Aid of Jurisdiction filed before that Court. In entering its Order of denial from which review is sought herein, the Supreme Court of Florida construed the language of its own Constitution.

The construction of a State's own Constitution by its Supreme Court is uniquely within the province of that Court and thus, no substantial federal ground is presented for invoking Certiorari.

The matters contained in Olsen's own Petition to the Florida Supreme Court for Constitutional Writ in aid of execution, were, in and of themselves, partially based on misrepresentations made by Olsen to the Florida Supreme Court in re the Record as is set forth herein, supra.

The entire Petition is but a rehash cloaked in new garments of previous arguments made to this Court and to the Supreme Court of Florida which have already been denied, and which matters have already been subject to Petitions for Rehearing, which in turn have been, themselves, denied.

For the foregoing reasons we respectfully urge that this Court deny Certiorari and dismiss the Petition herein, forthwith.

Respectfully submitted,

LAW OFFICES OF
LEO GREENFIELD, P.A.
1680 N.E. 135th Street
North Miami, Florida 33181
Attorneys for Respondent

By_____
Leo Greenfield

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was this _____ day of March, 1977, mailed to:

ROBERT D. PELOQUIN, ESQ.,
1707 - H Street, N.W.
Suite 400 Washington, D.C. 20006

and

JOHN W. PRUNTY, ESQ.,
837 City National Bank
Miami, Florida 32130
Attorneys for Petitioner

By_____
Leo Greenfield

APPENDIX

APPENDIX "A"

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

CASE NO. 45,356
DCA CASE NO. 72-798

SAUL GOODMAN,

Petitioner,

v.

RICHARD H. OLSEN,

Respondent.

Opinion files November 7, 1974

Writ of Certiorari to the District Court of Appeal, Third District

Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner

John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So.2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry v. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div. 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending upon a reasonable contingency, is not ipso facto usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S. 2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is no certainty that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S. 2d 106, 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup. Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint ven-

ture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), rev'g 12 Misc. Rep. 434 (Dist. Ct. N.Y. City 1895). In the Orvis case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lost anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in Orvis held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the Orvis minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: Cusick v. Ifshin, supra.

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000 was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumpton there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur

OVERTON J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circut Court and the Third District Court of Appeal.

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 43,168 and 45,356

SAUL GOODMAN

Petitioner,

v.

RICHARD H. OLSEN,

Respondent.

PETITION IN FAVOR OF REVIEW

COME NOW Donald L. Tucker, as Speaker of the Florida House of Representatives, and William J. Rish, as Chairman of the Florida House of Representatives' Select Committee on Impeachment Inquiry Into the Conduct of Supreme Court Justice Davis L. McCain, by and through counsel, and file this Petition in Favor of Review of the Petition for Constitutional Writ in Aid of Jurisdiction which was filed in the above-cited causes, and as good cause therefor state:

1. Petitioners have reviewed formerly confidential files of the Supreme Court and the Impeachment Record and concur in the allegations as set out in the Petition filed in this cause that several misrepresentations of fact and law and misstatements of fact and law have been practiced upon the Court.

2. Petitioners having reviewed the Petition for Constitutional Writ further state that practices and methods of former Justice McCain, as alleged in the Petition, are those which the Select Committee discovered in its impeachment investigation of former Justice McCain.

3. The allegations of the Petition, if true, would appear to warrant this Court assuming jurisdiction pursuant to Article V, Section 3 (b)(4), Florida Constitution, at least until it lays to rest any suspicion or feeling of wrongdoing, misrepresentation or misstatements in reference to the instant cause.

4. Petitioners note throughout the discussion in the inner Court memoranda prepared by former Justice McCain he made several misstatements of fact and law which could lead to a different result in this cause.

5. Petitioners further assert that it is in the public interest when questions of this type are raised before the Court, that the Court review the matter to determine that the facts found by the jury and comprising the record below have not been ignored or distorted by a Justice in reaching a decision so that fraud or other imposition has been perpetrated upon this Court, or any other party, and so that no ruling of this Court is rendered upon a misrepresentation or misstatement of the facts.

WHEREFORE, Petitioners pray that this Court take jurisdiction in the above cited causes and enter its Order granting Petitioners leave to intervene for the purpose of filing an amicus brief in support of facts and jurisdiction and such other pleadings as provided by the rules and laws of Florida.

Respectfully submitted,

/s/ Talbot S. D'Alemberte

Talbot S. D'Alemberte
Counsel, Select Committee on Impeachment

by: /s/ Marc H. Glick

Marc H. Glick
Counsel/Staff Director
Select Committee on Impeachment
FLORIDA HOUSE OF REPRESENTATIVES